

**ARKANSAS POLLUTION CONTROL AND ECOLOGY COMMISSION**

IN THE MATTER OF CITY OF	) DOCKET NO. 03-001-P
JONESBORO, CLASS 4 LANDFILL,	)

AND

IN THE MATTER OF CITY OF	) DOCKET NO. 03-003-P
JONESBORO, CLASS IV LANDFILL	) (Consolidated Docket
	) No. 03-001-P)
	) ORDER NO. 3

**ORDER**

**A. Introduction**

On June 30, 2003, Citizens Against More Pollution, and Debbie Hazlewood, John Hazlewood, Rick Tribble, Diane Tribble, Sidney Crawford, Pat Crawford, Floyd Goodman, Hazel Goodman, Larry Lamkin, Joyce Lamkin, Johnny Taylor, Elwanda Taylor, Mary Kelley, and Carl Kelley, individually, filed a Third Party Request for Commission Review and Adjudicatory Hearing. The administrative hearing officer ("AHO") will refer to all those listed above as "CAMP." CAMP appeals an Arkansas Department of Environmental Quality ("ADEQ") decision to issue the City of Jonesboro ("Jonesboro") a Class 4 landfill permit.

On July 2, 2003, B & G Land Company, Inc., E. Sloan Farms, Inc., John T. Sloan and James E. Sloan, Jr., Co-Trustees of the Betty T. Sloan Trust, and Cyndy Bednar filed a Third Party Request for Commission Review and Adjudicatory Hearing. The AHO will refer to all those listed above as "B & G." B & G also

appeals ADEQ's issuance of a Class 4 landfill permit to Jonesboro.

Jonesboro filed a motion to dismiss the appeals of CAMP and B & G because they untimely filed their appeals of the permitting decision. ADEQ also seek dismissal of various persons as parties and issues. The AHO heard argument on the motions on September 9, 2003.

### **B. Facts**

Mr. Steve Martin is chief of ADEQ's Solid Waste Management Division. On May 20, 2003, Martin issued a permitting decision authorizing Jonesboro to construct, operate, and maintain a Class 4 landfill facility. The decision stated that any person with legal standing could appeal by filing within 30-days of the May 20 permitting decision.

Within days after the issuance of the decision, CAMP notified ADEQ that it had not responded to comments CAMP had submitted. CAMP commented on ground water contamination, Jonesboro's bad actor status, nuisance conditions at the existing landfill, and Jonesboro's failure to follow its current permit. On June 3, 2003, Martin sent a letter and ADEQ's response to CAMP's comments to Jonesboro and the persons commenting on the permit. ADEQ had overlooked the comments because they were included with some other documents related to

a lawsuit that CAMP sent to ADEQ. Due to the delay in responding to the comments, Martin stated that the 30-day appeal period would begin with the date on the certificate of service, which was June 3, 2003.

**C. Filing appeal within thirty (30) days**

Jonesboro moves to dismiss the appeals because CAMP and B & G did not file them within the time provided by law. An interested party must file a request for hearing within 30-days after ADEQ issues a final decision. A.C.A. § 8-4-205(b)(1). Martin issued the final permitting decision on May 20, 2003. *Jonesboro Exhibit 1*. CAMP and B & G filed their appeals on June 27 and July 1, which was more than 30 days after the issuance of the permitting decision. The appeals are untimely and the Commission must dismiss them.

Camp and B & G vehemently dispute Jonesboro's argument that they filed their appeals late. Regulation 8, § 2.1.10(a)(2) requires the director to respond to all comments before there is a final permitting decision. They contend the permit could not become final until ADEQ responded to CAMP's comments and that did not occur until June 3. Martin notified Jonesboro and the persons commenting that due to the delay in responding to CAMP's comments the 30-day appeal period would begin on June 3. ADEQ

*Exhibit 1.* Therefore, they filed their appeals within 30-days of Martin's June 3 letter.

The requirements for filing an appeal of permitting decision are set out in Arkansas Code Annotated § 8-4-205(b)(1) as follows:

"Only those interested persons, other than the applicant, who have submitted comments on the record regarding a proposed permit action during the public comment period shall have standing to request a hearing by the commission in connection therewith, upon written application made within thirty (30) days after the date of the Arkansas Department of Environmental Quality's final decision regarding the permit action."

Regulation 8, § 2.1.10(a)(2) states, in part, the following:

"The Director's final decision shall include a response to each issue raised in any public comments received during the public comment period, if any."

The statute provides that an appeal must be filed within 30-days of a final decision regarding the permit action. The AHO must decide on what date Martin issued the final decision on the permit action. The provisions of Regulation 8, § 2.1.10(a)(2) guides the AHO in determining the date of the final decision. This rule imposes a duty on the director to respond to each issue raised in public comments. CAMP filed comments on issues not addressed by any other interested person. Martin did not respond to CAMP's comments until June 3, 2003. Therefore,

Martin's May 20 letter could not have been a final decision on the permit action. Martin did not respond to CAMP's comments until June 3, 2003. The AHO finds that June 3 was the date of the final decision on the permit action. Therefore, CAMP and B & G timely filed their appeals within 30 days of the June 3, 2003 final permitting decision.

ADEQ, CAMP and B & G also presented another defense to Jonesboro's motion to dismiss. They contend that if the AHO decides Martin issued the final permitting decision on May 20, CAMP and B & G can establish good cause for filing the appeal late. Regulation 8, § 2.5.4(a) states as follows:

"An action brought by any person who fails to file a Request for Commission Review and Adjudicatory Hearing or a Third-Party Request for Commission Review and Adjudicatory Hearing within the time periods prescribed in Subsections 2.1.14, 2.2.4, or 2.5.3(b), as applicable, shall be dismissed, unless good cause is shown for the late filing."

Regulation 8, § 2.5.3(b) governs the filing of a third-party appeal. ADEQ, CAMP and B & G contend that good cause exists for allowing the late filing of their third-party appeals. CAMP and B & G relied on Martin's June 3 letter that extended the filing deadline. Martin's letter establishes good cause for the late filing.

Jonesboro asserts that Martin had no authority to extend the filing deadline. It insists that the good cause rule is

inconsistent with the statute requiring appeals to be filed within 30-days of the permit action. The regulation is invalid because it exceeds the scope of the Commission's authority to allow a person to appeal a permitting decision after the 30-day statutory deadline. *T. 8.*

The Commission adopted Regulation 8, § 2.5.4(a) on May 18, 2000 and it became effective on June 12, 2000. *Minute Order No. 00-17.* "It has become axiomatic that an agency is bound by its own regulations." *City of Benton v. Arkansas Soil and Water Conservation Com'n*, 345 Ark. 249, 45 S.W.3d 805 (2001). The AHO finds that the Commission is bound by § 2.5.4(a). The Commission has authority to not dismiss an appeal that is filed late if a party can show good cause for the late filing. In this case, Martin's June 3 letter changed the starting date of the 30-day appeal period. The AHO finds that CAMP and B & G relied on Martin's June 3 letter to calculate the last day on which to file an appeal. The AHO concludes that their reliance on Martin's letter establishes good cause for not dismissing CAMP and B & G's appeals.

#### **D. Proper parties**

ADEQ moves to dismiss all persons listed as parties in the B & G's appeal, except John T. Sloan. Sloan was the only person listed in B & G's appeal that commented at the public hearing.

ADEQ believes he may be a proper party. None of the other persons listed as parties in the appeal commented during the public comment period. *ADEQ Brief in Support of Motion to Dismiss B & G Land Company Et Al., at 1.*

Mr. Malcolm Culpepper is B & G's attorney and he submitted written comments to ADEQ and made comments during the public comment period. *ADEQ Exhibit 2 and B & G Brief in Support of Supplement, Exhibit G.* ADEQ argues that Culpepper never stated, in either his oral comments or his written comments, that he was appearing on behalf of any of the persons that are listed as a party in B & G's request for review. *T. 46.* Since those persons, except for Sloan, did not comment, ADEQ contends they have no standing to appeal. *T. 44-45.* Culpepper can represent only himself in this appeal. *T. 46.*

B & G argues that the persons listed as parties have standing to appeal because ADEQ knew that Culpepper represented them. Culpepper and Ms. Lacey Nix, an attorney in the law firm, communicated with the staff on many occasions. *T. 52.* In addition, Culpepper introduced himself as representing each person named as a party in the B & G appeal at the March 6, 2003 public hearing to take public comments. *T. 53.* ADEQ did not record the entire hearing and it did not instruct the people attending the hearing to identify themselves when they stood to

make a comment. Culpepper had already identified himself as representing B & G and did not do so again because he was not privy to when ADEQ turned on the tape recorder. T. 57. B & G had no control over what the ADEQ staff recorded and Culpepper's clients should not be penalized for something that was out of their control. *Brief in Support of Supplement at 7.*

An interested person who submits comments on the record has standing to request a hearing on a permit action. A.C.A. § 8-4-205(b)(1). A person submits comments on the record during the public comment period either in writing or orally. The AHO has reviewed Culpepper's written comments and the transcript of the March 6, 2003 public hearing. Culpepper's written comments do not show him as representing the persons listed as parties in the appeal. *ADEQ Exhibit 2.* The March 6 transcript of the public hearing reflects nothing other than Culpepper made comments concerning the proposed landfill permit. Culpepper identified himself as a practicing attorney in Jonesboro and then he made comments. Nothing in the transcript shows he made comments on behalf of B & G Land Company or any of the other persons listed as parties in the appeal. *Brief in Support of Supplement, Exhibit G at 4.* In contrast to Culpepper, CAMP's attorney, Mr. Hunter Hanshaw, stated his name and that he was



the attorney for Citizens Against Pollution. *Brief in Support of Supplement, Exhibit G at 2.*

A person must have commented on the record to have standing to appeal. A.C.A. § 8-4-205(b)(1). An attorney may comment on behalf of one or more clients, but the record must show the attorney identified his client or clients during the public comment period. A review of the March 6 hearing transcript and Culpepper's written comments fails to show he ever identified any of his clients. The AHO strictly construes the statutory language regarding standing to appeal. The purpose of this statute is to allow only those persons that made comments during the public comment period to appeal a permitting decision. If the record does not clearly reflect the name of the person commenting or an attorney does not identify his client, then the AHO must dismiss that person from being a party to a permit appeal.

Based on the record, the AHO finds no evidence that B & G Land Company, Inc., E. Sloan Farms, Inc., James E. Sloan, Jr., Co-Trustees of the Betty T. Sloan Trust, or Cyndy Bednar made comments on the record individually or through their attorney, Malcolm Culpepper. Therefore, the AHO finds that B & G Land Company, Inc., E. Sloan Farms, Inc., James E. Sloan, Jr., Co-Trustees of the Betty T. Sloan Trust, and Cyndy Bednar do not

have standing to appeal Jonesboro's Class 4 landfill permit. The AHO dismisses them from this proceeding.

The March 6 transcript shows that John Sloan orally commented at the public hearing. *Brief in Support of Supplement, Exhibits G at 12.* The AHO finds John T. Sloan has standing to appeal and that he is a proper party as listed in the B & G appeal.

#### **E. Issues**

ADEQ moves to dismiss B & G's appeal because Sloan did not comment on the issues set out in the appeal when he made his public comments. An interested person must raise an issue in public comments to place ADEQ on notice and allow it to address the issue during the permitting process. *T. 61.* ADEQ claims that comments must identify "(1) facts that establish a violation of the underlying statute in question, and (2) facts that establish that the alleged violation must effect the issuance of a landfill permit." *Brief in Support of ADEQ's Motion to Dismiss B & G Land Company et al., at 6.* The only comment Sloan made was of an individual nature. He did not place ADEQ on notice of any issues concerning the landfill. *T. 63.* The issues set out in the B & G appeal are not proper because Sloan did not raise them.

There is a difference between making a comment and raising specific issues in the third-party appeal. First, an interested person must comment on the record during the public comment period in order to have standing to appeal a permitting decision. A.C.A. § 8-4-205(b)(1). This statute does not state what a comment must address. It simply requires a person to make a comment in order to have standing to appeal. The AHO found above that Sloan commented during the public comment period and this gave Sloan standing to appeal.

Second, no interested party may raise an issue that was not raised in public comments. A.C.A. § 8-4-205(b)(2). The statute does not limit a party to appealing only those issues that the party raised during public comments. Therefore, the AHO finds that a party may appeal any issue raised by any person during the public comment period.

The AHO concludes that the specific issues identified by CAMP and B & G conform to the requirements of A.C.A. § 8-4-205(b)(2).

#### **F. Complete and detailed statement**

A request for review and hearing must specifically identify each issue raised in public comments that a party appeals. This is necessary so all other parties will know exactly what specific issues a party seeks to contest. The AHO will not


permit a party to incorporate by reference all comments made during the public comment period or reserve the right to raise additional issues based on any comments made during the public comment period. The statute requires a complete and detailed statement identifying the factual and legal objections to the permitting decision. A.C.A. § 8-4-205(b)(3). Reserving the right to raise issues based on all public comments fails to a complete statement of what a party is appealing and fails to meet the statutory requirement of providing a detailed statement of the issues. The AHO finds that CAMP and B & G's third-party requests for review stated that they were reserving the right to raise additional issues. The AHO bars CAMP and B & G from raising issues other than those specifically set out in their requests for review. The AHO also finds that the specific issues identified by CAMP and B & G conform to the requirements of A.C.A. § 8-4-205(b)(3).

**IT IS, THEREFORE, ORDERED:**

1. The City of Jonesboro's motion to dismiss is denied.
2. ADEQ's motion to dismiss all persons as parties in B & G Land Company, Inc., et al., Third-Party Request for Commission Review and Adjudicatory Hearing, except John T. Sloan, is granted.

3. ADEQ's motion to dismiss the issues set out in B & G's request for review is denied.

This 7<sup>th</sup> day of October 2003.

  
Michael O'Malley  
Administrative Hearing Officer

CERTIFICATE OF SERVICE

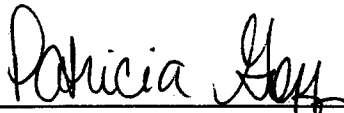
I, Patricia Goff, Commission Secretary, hereby certify that a copy of the foregoing Order No. 3, **IN THE MATTER OF THE CITY OF JONESBORO, CLASS 4 LANDFILL (03-001-P) & CLASS IV LANDFILL (03-003-P)**, has been mailed by certified mail or by first class mail, postage prepaid to the following parties of record, this 7<sup>th</sup> day of October 2003.

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